Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

87-819

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987.

KEELY SMITH,

Petitioner

v.

INTERNATIONAL FUNDING CORPORATION, A California corporation, MAX D. MARTIN, an individual, CHARLES E. ELERDING, JR., an individual, JANET R. ELERDING, an individual, T.D. SERVICE COMPANY, a California corporation,

Respondents.

On Appeal from the Ninth Circuit Court of Appeals

APPENDIX TO PETITION FOR CERTIORARI

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EDITOR'S NOTE

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEELY SMITH,	(FILED 7/16/86)
Plaintiff-Appellant	NO. 85-2851
vs.	DC#CV-LV-79-111 -LDG
INTERNATIONAL FUNDING CORPORATION, a Californian corporation, et al.,	Nevada-Las Vegas
	ORDER
Defendant-Appellees	

Before: FLETCHER, NELSON and THOMPSON, Circuit Judges

Appellant Keely Smith appeals from the district court's November 1, 1985 order holding that a prior decision of the district court, entered October 7, 1983, was a final judgment. Each party now seeks summary disposition. We summarily affirm. See United States v.

Hooten, 693 F.2d 857 (9th Cir. 1982) (per curiam).

The October 7 judgment was final and appealable. The judgment was accompanied by an extensive opinion and by equally thorough findings of fact and conclusions of law. The district court never issued a further judgment, and the court's intent to enter a final judgment is clear.

Furthermore, the district court entered a separate judgment in accordance with Fed. R. Civ. P. 58. Rule 58 was amended in 1963 to require entry of a separate judgment precisely to alleviate the difficulties alleged here and discussed in United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227 (1958). See Fed. R. Civ. P. 58 advisory committee note; see also Bankers Trust

Co. vs. Mallis, 435 U.S. 381, 386 (1978) (per curiam); United States v. Indrelunas, 411 U.S. 216, 220 (1973) (per curiam). In view of the separate judgment entered here, appellant's attempts to challenge the finality of the October 7 judgment only after she missed a crucial filing deadline are without merit.

Finally, the actual damages awarded to appellant can be ascertained by referring to the opinion and the findings of fact and conclusions of law. Any ambiguity in the judgment should have been resolved by a motion for clarification under Fed. R. Civ. P. 60.

MoCal 6/23/86

(filed June 9, 1987
Cathy A. Catterson, Clerk
U.S. Court of Appeals)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEELY SMITH, Plaintiff/Appellant) INTERNATIONAL FUNDING CORPORATION a California corporation; MAX D. MARTIN, an individual; CHARLES E. ELERDING, JR., an individual; JANET R. ELERDING, an individual; and T.D. SERVICE COMPANY, a California corporation. Defendants/Appellees)	No. 85-1611 DC # CV-LV-79-111 LDG MEMORANDUM[1]

[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 21.

Appeal from the United States District Court for the District of Nevada
Lloyd D. George, District Judge, Presiding

Submitted May 11, 1987[2]
San Francisco, California

Before: SKOPIL, FARRIS, and O'SCANNLAIN, Circuit Judges

Plaintiff/appellant Keely Smith appeals the district court's denial of her motion to treat an untimely motion filed pursuant to Fed. R. Civ. P. 59(e) as a motion for relief from judgment under Fed. R. Civi. P. 60(a) or 60(b), or alternatively to extend the time for filing a notice of appeal under Fed. R. App. P. 4(a) (5). We affirm the district court.

---

[2]The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34 (a), Ninth Circuit Rule 3(f).

DISCUSSION

1. Rule 60(a)

Smith requests relief pursuant to Fed.R.Civ. P. 60(a). We review the denial of her request for an abuse of discretion. Cintron v. Union Pac. R.R., 813 F.2d 917, 919 (9th Cir. 1987). In determining whether a district court should alter a judgment pursuant to Rule 60(a), this circuit "focuses on what the court originally intended to do" Blanton v. Anzalone, 813 F.2d 1574, 1577 (9th Cir. 1987) emphasis in original).

In this case the district court determined the loans were usurious and then considered what remedial measures would be appropriate. The district court distinguished Pease v. Taylor, 88 Nev. 287, 496 P.2d 757 (1972). It concluded that Smith had fair use of the money loaned to her and that she "should not be awarded a windfall of the ten percent interest she expected to

pay." It is clear that the district court "originally intended" to hold Smith liable for the ten percent interest, and this intent was unequivocally stated in the judgment. Therefore the district court did not abuse its discretion in denying Smith's Rule 60(a) motion.

2. Rule 60(b)(1)

Smith also requests relief from the judgment due to "mistake, inadvertance, surprise or excusable neglect." Fed. R. Civ. P. 60(b)(1). A denial of relief under Rule 60(b) is reviewed for an abuse of discretion. Thompson v. Housing Authority of Los Angeles, 782 F. 2d 829, 832 (9th Cir.) cert. denied, 107 S.Ct. 112 (1986).

The court must consider (1) absence of notice under Fed. R.Civ. P. 77(d); (2) lack of prejudice to respondent; (3) prompt filing of a motion after actual notice; and

(4) due diligence by counsel in attempting to be informed of the date. Id. at 460. "Ignorance of court rules does not constitute excusable neglect." Swimmer v. IRS, 811 F.2d 1343, 1345 (9th Cir. 1987).

Although Smith's counsel presents a compelling explanation as to why he was unable to file the 59(e) motion with the alloted ten-day period, he has not shown that the district court abused its discretion. There was no error on the part of the clerk or the judge. Smith's counsel had notice that the judgment had been entered. We will not grant relief when it is clear from the record that Smith's counsel knew the judgment had been entered.

3. Fed. R.App. P. 4(a)(5)

Smith also appeals the district court's denial of an extension of time or filing a notice of appeal. Relief is not available

under Fed. R.App. P. 4(a)(5). Because the untimely Rule 59(e) motion did not toll the statutory time in which to appeal, the notice of appeal was not timely. See Browder v. Director, Dept. of Corrections. 434 U.S. 257, 264-54 (1978); Fiester v. Turner, 783 F.2d 1474, 1475 (9th Cir. 1986).

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEELY SMITH,	(FILED 7/30/87)
Plaintiff-Appellant	NO. 85-1611
vs.	DC#CV-LV-79-111 -LDG
INTERNATIONAL FUNDING CORPORATION, a California corporation, et al.,	Nevada-Las Vegas
Defendant-Appellees	ORDER

Appeal from the United States District Court for the District of Nevada
Lloyd D. George, District Judge, Presiding

Before: SKOPIL, FARRIS, and O'SCANNLAIN, Circuit Judges

The panel has voted to deny appellant's petition for rehearing.

The petition for rehearing is denied.

Filed October 6, 1983
Entered October 7, 1983
U.S. District Court
District of Nevada

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KEELY SMITH, Plaintiff, v. INTERNATIONAL FUNDING CORPORATION, a California corporation; MAX D. MARTIN, an individual; MARGUERITE L. MARTIN, an individual; CHARLES E. ELERDING, an individual, JANET R. ELERDING, an individual; T.D. SERVICE COMPANY, a California corporation, Defendants.	)	CV-LV-79-111,HEC JUDGMENT

This action came on for trial before the court and issues having been duly

tried and a Decision having been duly rendered,

IT IS ORDERED AND ADJUDGED as follows:

1) That the Plaintiff recover of the Defendants Max D. Martin and International Funding Corporation, a California corporation, the sum of $11,520, representing the prepayment penalty on a loan transacted in 1976.

2) That the Plaintiff recover of the Defendants Max D. Martin and International Funding Corporation, a California corporation, the sum of $35,000, constituting loan fees paid by the Plaintiff unto said Defendants by reasons of loans transacted in 1976 and 1978.

3) That the Plaintiff recover of the Defendants Max D. Martin and International Funding Corporation, a California

corporation, the incremental portion of interest above 10 percent paid by the Plaintiff unto the Defendants on loans transacted in 1976 and 1978.

4) That Plaintiff have judgment against the Defendants Max D. Martin and International Funding Corporation, a California corporation, in that this court adjudges the loan obligations created by the transactions in 1976 and 1978 to be usurious and the Plaintiff is hereby relieved of any obligation to pay any sum of interest thereon exceeding 10 percent per annum.

5) That the Plaintiff take nothing by reason of her cause of action against the Defendants Charles E. Elerding and Janet R. Elerding and said action is dismissed on the merits.

6) That the Counter-claimants Max D. Martin and International Funding

Corporation, a California corporation, take nothing by reason of their said Counter-claim against the Plaintiff and that the same be dismissed on the merits.

7) That the Defendants Charles E. Elerding and Janet R. Elerding take nothing by reason of their Cross-claim filed against the Defendants Max D. Martin and International Funding Corporation, a California corporation, and that said action be dismissed on the merits.

8) That the Preliminary Injunction heretofore issued is dissolved.

DATED: This 6th day of October, 1983.

/s/ HARRY CLAIBORNE
CHIEF JUDGE, U.S. DISTRICT COURT

WILLIAM L. McGIMSEY
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Las Vegas, NV. 89101
382-9948

Attorney for Elerdings

(Entered December 28, 1984, by Clerk, U.S. District Court)

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KEELY SMITH, Plaintiff, v. INTERNATIONAL FUNDING CORPORATION, a California corporation; MAX D. MARTIN, an individual; MARGUERITE L. MARTIN, an individual; CHARLES E. ELERDING, JR., an individual; JANET R. ELERDING an individual; T.D. SERVICE COMPANY, a California corporation, Defendants.	CV-LV-79-111,HEC

ORDER DENYING MOTIONS

Plaintiff's following Motions:

1. Motion for Reconsideration of

Order and Clarification of Judgment Entered December 19, 1983; and

Motion to Treat Plaintiff's Motion filed October 20, 1983, as a Motion for Relief from Judgment under F.R.C.P. Rule 60(a) or, in the alternative, to Grant Plaintiff Relief from the Judgment Entered October 7, 1983, under F.R.C.P. Rule 60(a) filed this date.

2. Motion for Reconsideration of Order Entered December 19, 1983, or Motion to Treat Motion filed October 20, 1983, as a Motion for Relief from Judgment under F.R.C.P. 60(b) or in the alternative Motion to Grant Plaintiff Relief from Judgment under F.R.C.P. 60(b) as filed this date; and

3. Motion under F.R.C.P. 4(a)(95) to Extend the Time for Filing Notice of Appeal,

having come on to be heard on November 23, 1984, Plaintiff appearing together with counsel JOHN P. FOLEY, ESQ., Defendants, Elerdings appearing together with counsel, WILLIAM L. McGIMSEY, ESQ., and RAYMOND G.

ALVARADO, ESQ., and Defendant, International Funding Corporation appearing through counsel, ROBERT W. STORY, ESQ., of Lionel, Sawyer & Collins, the Court having heard and considered the argument of counsel and the file herein, and good cause appearing therefor,

IT IS HEREBY ORDERED that the Plaintiff's following motions, to wit:

1. Motion for Reconsideration of Order and Clarification of Judgment Entered December 19, 1983; and

Motion to Treat Plaintiff's Motion filed October 20, 1983, as a Motion for Relief from Judgment under F.R.C.P. Rule 60(a) or, in the alternative, to Grant Plaintiff Relief from the Judgment Entered October 7, 1983, under F.R.C.P. Rule 60(a) filed this date.

2. Motion for Reconsideration of Order Entered December 19, 1983, or Motion to Treat Motion filed October 20, 1983, as a Motion for Relief from Judgment under F.R.C.P. 60(b) or in the

alternative Motion to Grant Plaintiff Relief from Judgment under F.R.C.P. 60(b) as filed this date; and

3. Motion under F.R.C.P. 4(a)(95) to Extend the Time for Filing Notice of Appeal,

are hereby denied.

ORDERED this /27th/ day of December,1984.

/s/ LLOYD D. GEORGE
District Judge

Submitted by:

/s/ WILLIAM L. McGIMSEY, ESQ.
WILLIAM L. McGIMSEY, ESQ.
720 S. Fourth Street, # 300
Las Vegas, NV 89101
Attorney for Elerdings

APPROVED AS TO FORM:

/s/ JOHN P. FOLEY
JOHN P. FOLEY, ESQ.
601 S. Rancho Drive, #A-1
Las Vegas, NV 89106

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KEELY SMITH, Plaintiff, v. INTERNATIONAL FUNDING CORPORATION, a California corporation, et al., Defendants.	(RECEIVED & FILED ON 10/31/85) (ENTERED 11/01/85) CV LV 79-111, LDG

ORDER

On October 6, 1983, after hearing a trial before the Court in this case, Judge Harry E. Claiborne issued Findings of Fact and Conclusions of Law, a written Decision, and a Judgment. The Judgment was entered on October 7, 1983. Thirteen days after entry of judgment, the Plaintiff filed a motion under Rule 59 of the Federal Rules of Civil

Procedure to alter or amend judgment. Visiting United States District Judge Richard M. Bilby subsequently denied this motion on December 16, 1983, because more than the maximum ten days had elapsed since entry of the Judgment. On January 17, 1984, the Plaintiff gave notice to this Court of her appeal of parts of the Judgment of October 6, 1983, and also of Judge Bilby's Order of December 16, 1983. The Defendants made a motion to dismiss Plaintiff's appeal, and the Ninth Circuit granted the Motion to Dismiss in July, 1984.

Undaunted, Plaintiff filed on December 4, 1984, a motion with this Court under Federal Rule of Civil Procedure 54(b) for an order directing the final judgment on one or more, but fewer than all, of the claims or parties.

This motion was basically a request for this Court's order that Judge Claiborne's Judgment entered October 7, 1983, be determined not to be a final judgment. This Court was reminded of the Rule 54(b) motion at a hearing held on May 13, 1985, at which time the Court directed the Plaintiff to request that the Ninth Circuit remand the 54(b) motion back to this Court. The Plaintiff sought and was granted this remand.

This Court is now faced with the question of whether Judge Claiborne's Judgment of October 7, 1983, was a final judgment. If the Judgment was final then the Plaintiff probably has no recourse against it because of the late filings of her post-trial motions and appeals. If, on the other hand, Judge Claiborne's Judgment was not final, then the Judgment

continues to be subject to modification and the time for its appeal has not yet begun to run.

What constitutes a final judgment is a question that has been addressed several times by the United States Supreme Court. In Catlin v. United States, 3245 U.S. 229, 233 (1944), the Court stated that "(a) 'final decision' generally is one which ends the litigation on the merits and leave nothing for the court to do but execute the judgment." In a later case, the Court went on to say that "(s)o long as the matter remains open, unfinished or inconclusive , there may be no intrusion by appeal." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1948). Finally, in the case most heavily relied upon by plaintiff and

defendants in the instant action, the Court found that whether a judgment is final "depends upon whether the judge has or has not clearly" so intended. United States v. F & M Schaefer Brewing Co., 356 U.S. 227, 232 (9158).

The Schaefer case is the most applicable to the instant case. In Schaefer, the district judge granted a motion for summary judgment and issued a written opinion which was entered as a judgment by the clerk. Subsequently, the moving party presented to the judge a formal judgment, which the judge signed and had the clerk enter. The "judgment" differed from the earlier "opinion" in its title and its more specific assessment of interest and costs. An appeal to the summary judgment was later filed. The appellate court found the

appeal untimely since it was taken more than 60 days after the entry of the trial court's original opinion. The United States Supreme Court reversed the appellate court after determining that the "opinion" was not a final judgment, and that the appeal was within 60 days of the "judgment."

In the instant case the Plaintiff and Defendants rely on different language from Schaefer to support their respective positions. The Plaintiff favors language to the effect that the dollar amount of a money judgment must appear on the face of the judgment. In this regard the Schaefer Court stated:

> Rule 79(a) expressly requires that the clerk's entry "shall show . . . the substance of (the) judgment of the court . . . " Surely the amount of a

> judgment for money is a vital part of its substance. To hold that one must search the whole record to determine the amount, or the facts necessary to compute the amount of a final judgment for money would be to ignore the quoted provision of Rule 79(a).

Id. at 234-35. The Plaintiff argues that since, in the instant case, the amount of damages is not ascertainable without reference to documents other than the Judgment, the Judgment reference to documents other than the Judgment, the Judgment cannot be a final judgment.

The Defendants rely on language from Schaefer to the effect that the judge's intent controls and that the amount of a judgment may be determined by reference to material outside of the judgment. The Schaefer Court stated:

> (I)t is obvious that a final judgment for money must, at least, determine, or specify

> the means for determining, the amount (United States v. Cooke (CA9 Hawaii) 215 F.2d 528, 530); and an opinion, in such case, which does not either expressly or by reference determine the amount of money awarded reveals doubt, at the very least, whether the opinion was a "complete act of adjudication . . . or was intended by the judge to be his final act in the case.

Id. at 233-34. The Defendants argue that a search of the entire record is not necessary to determine the amount of the Judgment in the instant case. Rather, all that is necessary is reference to Judge Claiborne's extensive Findings of fact and Conclusions of Law and his Decision, both of which were issued concurrently with his Judgment.

The Schaefer case is distinguishable from the instant case. In Schaefer, the Court determined which

of two filed "judgments" was the final judgment as follows:

> The actions of all concerned--of the judge in not stating in his opinion the amount, or means for determining the amount, of the judgment; of the clerk in not stating the amount of judgment in his notation on the civil docket; of counsel for the Government in not appealing from the "Opinion"; of counsel for respondent in preparing and presenting to the judge a formal "judgment" on May 24; and, finally, of the judge himself in signing and filing the formal "judgment" on the latter date--clearly show that none of them understood the opinion to be the judge's final act or to constitute his final judgment in the case.

Id. at 355-56.

Evidence as to the intended status of Judge Claiborne's Judgement in this case is very different than that as to the "opinion" in the Schaefer case. First, there is no indication that

counsel for Plaintiff or Defendants initially treated Judge Claiborne's judgment as anything but final. Counsel for the Plaintiff filed post-judgment motions and appeals following the judgment as if it were final. Only when Plaintiff discovered that she had missed a filing deadline did she question the finality of Judge Claiborne's Judgment. Second, Judge Claiborne himself never issued a further judgment, nor is there indication that he intended to alter or supplement his decision. Rather, Judge Claiborne's Judgment and accompanying documents were very extensive. Finally, although the Clerk's entry of Judgment was not specific as to the amount of judgment, it did express the substance of the Judgment as to who prevailed on which counts. The Clerk's entry also referred

to the Judgment, from which the amount of judgment could be ascertained when read in conjunction with the Findings of Fact and Conclusions of Law and the Decision.

For the foregoing reasons, it is hereby

ORDERED that the Judgment entered in this case on October 7, 1983, be determined a final Judgment.

DATED: October 31, 1985

/s/
LLOYD D. GEORGE
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KEELY SMITH, Plaintiff, v. INTERNATIONAL FUNDING CORPORATION, a California corporation; MAX D. MARTIN, an individual; MARGUERITE L. MARTIN, an individual; CHARLES E. ELERDING, JR., an individual; JANET R. ELERDING an individual; T.D. SERVICE COMPANY, a California corporation, Defendants.	CV-LV-79-111,HEC FINDINGS OF FACT AND CONCLUSIONS OF LAW. Received and Filed October 6, 1983 Carol C. Fitzgerald District Clerk

This matter was set for a court trial which took place from April 13, 1983 through April 21, 1983. The parties were directed to file post-trial briefs with the court, and a hearing of arguments on the post-trial briefs was conducted on May 31, 1983. On that date, the court took the case under submission.

The lawsuit is brought by Keely Smith against Defendants International Funding Corporation (hereinafter "IFC"), a California corporation, Max Martin (hereinafter "Martin") and his wife Marguerite Martin, California residents, and Charles Elerding ("Elerding") and his wife Janet. Plaintiff has sued for damages, injunctive relief, and recission of two loan transactions which were entered into with Defendant IFC. The relief sought by Plaintiff against the remaining Defendants is derivative, based upon theories of agency and alter ego. The Defendants Elerdings and T.D. Service Company have cross-claimed for indemnity against the Defendants IFC and Martin. Defendant IFC has counterclaimed against Plaintiff for judgment on the notes signed by the Plaintiff as well as for foreclosure upon the real and personal property securing said notes.

FINDINGS OF FACT

1. Defendant IFC is a corporation organized under the laws of the State of California, and at all times relevant to the action was licensed as a personal property broker pursuant to California law. IFC was incorporated on November 21, 1975, and Max Martin served as President of the corporation at all times relevant to this lawsuit. Defendants the Martins and Elerdings were at all times relevant to this suit residents of the State of California.

2. During the first part of May, 1976, Plaintiff Keely Smith met with Defendant Martin in the State of California to discuss a loan to be made to Smith by IFC. Also in the early party of 1976, Martin approached Elerding and told him that he was operating a company called International Funding Corporation and asked him if he was interested in

lending him $220,000 so Martin could make a loan to Plaintiff Smith. Martin and Elerding had had prior business dealings dated from 1973, at which time Elerding first became acquainted with Martin, who was then employed by Far West Mortgage Company. Elerding, himself, had been in the business of making loans on real estate since 1973, and had made approximately fifty such loans between 1973 and May of 1980. In making these real estate loans, Elerding would lend money directly to a broker, usually a second trust deed broker or personal property broker.

3. On or about May 6, 1976, Plaintiff Smith went to the offices of IFC in Los Alamitos, California where she executed the following documents: 1) a Promissory Note in the amount of $160,000.00, and a Deed of Trust on Plaintiff's home at 46 Country Club Drive, Las Vegas, Nevada, securing this note

(Plaintiff had owned the Nevada residence since 1962); 2) a Promissory Note in the amount of $60,000, and a Deed of Trust on Plaintiff's residence at 10436 Kling Street, Toluca Lake, California, securing this note; and 3) security agreements on all of Plaintiff's personal property located in the Toluca Lake and Las Vegas homes, securing these two Promissory Notes.

4. Defendant IFC had, prior to May 6, 1976, received a loan commitment from Defendants, the Elerdings, wherein the Elerdings agreed to loan to Defendant IFC the sum of $220,000, which sum would be used by Defendant IFC to fund the loan to Plaintiff. These funds were received by Defendant IFC, and a Promissory Note was executed by IFC in the amount of $220,000. After the execution of the notes and security documents by Plaintiff Smith, as described above, the beneficial

interest in said documents was assigned by Defendant IFC to Defendants, the Elerdings, as collateral security for the Promissory Note from IFC to the Elerdings.

5. Plaintiff also executed the following documents in connection with the May, 1976 loans she received from IFC, which loans aggregated to $220,000:

A. Escrow instructions.

B. Directions to deposit the loan proceeds to the account of Keely Smith Enterprises, Inc.

C. Certification that Smith was a California resident at the time of the transaction.

D. Two statements of valuation of personal property.

E. Two certifications that the proceeds of the loans would be used in her business, Keely Smith Enterprises, Inc.

F. Two Truth in Lending Disclosure Statements.

G. UCC-1 financing statement relative to the $60,000 loan.

H. UCC-1 financing statement relative to the $120,000 loan.

In consideration of the $60,000 Promissory Note, Plaintiff Smith received $60,000, from which the loan proceeds were distributed as follows:

Funds paid through escrow to retire second trust Deed on Toluca Lake property.	$39,437.50
Property taxes paid through escrow	3,055.27
Cash received by Plaintiff from IFC per check #1217	$ 217.33
Total	$42,710.00

The above amounts were received on or about May 11, 1976. In addition to the foregoing amounts, Plaintiff received a check #1216 from

IFC in the sum of $10,800, which Plaintiff endorsed in favor of Defendant IFC for payments of the first year's interest. Of the remaining balance $6,000 was paid out of escrow to IFC as loan fees, and $490 represented miscellaneous legitimate closing costs in connection with the $60,000 loan.

In consideration of the $160,000 Promissory Note, Plaintiff Smith received $160,000 form which loan proceeds were distributed as follows:

Cash received by Plaintiff from IFC per check # 1219, 5/11/86	$88,537.00
Cash received by Plaintiff from IFC per check # 1521, 10/15/76	$28,000.00
Total	$116,537.00

In addition to the foregoing amounts, On May 11, 1976, Plaintiff received a check from IFC, #1218, in the sum of $28,800 which was immediately endorsed over to IFC as prepayment of

the first year's interest. Of the remaining balance, the sum of $14,000 was paid out of escrow to IFC on a loan fee and, $663 represented miscellaneous closing costs.

The parties admit that Defendant Elerding was aware that the Promissory Notes executed by Plaintiff Smith on these loans provided for interest at the rate of 18%. On or about February 28, 1977, Plaintiff sold her Toluca Lake residence. The $60,000 note was paid in full at the closing, along with payment of a $4,320 prepayment penalty, less a rebate of the interest already paid, amounting to $1,860. Thereafter, the Deed of Trust on the Toluca Lake residence securing the $60,000 not was reconveyed to the Plaintiff. In January of 1978, Plaintiff was unable to make the payments on the $160,000 note as they came due, and Defendant IFC contacted Plaintiff regarding her default, at which time the

possibility of refinancing the loan was explored. Defendant IFC received a commitment from Defendants the Elerdings for the loan of an additional $300,000, which would be loaned by IFC to Plaintiff Smith for the purpose of refinancing the existing $160,000 loan, which Plaintiff was having difficulty meeting. When Plaintiff learned of the commitment which IFC obtained from the Elerdings, she immediately requested that the refinancing loan be funded. Prior to January, 1978, Plaintiff had paid eight monthly interest payments to IFC at the rate of $2,400 per month for the months May through December, 1977, amounting to a total of $19,200.

6. On or about March 2, 1978, Plaintiff executed the following documents in Las Vegas, Nevada:

A. Promissory Note in the amount of $300,000.

B. Deed of Trust on her Las Vegas property, securing the note.

C. Escrow instructions.

D. Disbursement instructions.

E. Certification that Smith as a California resident at the time of the transaction.

In order to receive funding for this loan, Defendant IFC executed a Promissory Note dated March 10, 1978 in the sum of $300,000 in favor of Defendants the Elerdings. In addition, Defendant IFC executed an Assignment of Deed of Trust in favor of Defendants the Elerdings.

In consideration of the $300,000 Promissory Note Plaintiff executed, she received $300,000 from which loan proceeds were distributed out of escrow as follows:

Check drawn to Keely Smith Enterprises, Inc. on the account of IFC.... $ 42,280.00

Pay off of the $160,000 loan $160,000.00

Prepayment penalty to IFC on the $160,000 loan..... $ 11,520.00

Delinquent monthly interest payments for the months of January, February and March 1978..... $ 7,200.00

Loan fee to IFC ..... $ 21,000.00

Prepayment to IFC of first year's interest. $ 54,000.00

As noted above, the sum of $42,280 was distributed to Plaintiff from IFC's California Bank to Keely Smith Enterprises, Inc.'s account at American City Bank, Beverly Hills, California. The $160,000 note was retired and a Full Reconveyance of Deed of Trust on Plaintiff's Las Vegas property securing the $160,000 loan was recorded with the Clark County, Nevada Recorder on March 13, 1978.

7. In April of 1979, Plaintiff failed to pay the IFC monthly installment of

$4,500 interest which was alleged to be due and payable on or about April 10, 1979 pursuant to the terms of the $300,000 Promissory Note executed by Plaintiff in favor of Defendant IFC. In April, 1979, Defendant IFC failed to pay to Defendants the Elerdings the monthly payment of $2,500 interest which was due and payable on or about April 10, 1979 pursuant to the $300,000 Promissory Note executed by IFC in favor of Defendants the Elerdings. Plaintiff Smith has paid no further monthly interest installments to defendant IFC. Defendant IFC in turn, has paid no further interest installments to Defendants the Elerdings.

8. On May 15, 1979, Defendants the Elerdings recorded in the Clark County, Nevada Recorder's Office a Notice of Substitution of Trustee, substituting T.D. Service Company as trustee of the Deed of Trust dated March 2, 1978, executed by Plaintiff in favor of IFC.

On May 15, 979, the Defendants the Elerdings also recorded a Notice of Default relating to the Deed of Trust dated March 2, 1978 executed by plaintiff Smith in favor of IFC. Subsequently, on or about June 14, 1979, Plaintiff filed with this court a Motion for Temporary Restraining Order and for a Preliminary Injunction and a Complaint for, inter alia, Intentional Breach of Contract, Fraud, Usury, and a Permanent Injunction. The Complaint gave notice to the defendants of Plaintiff's election to rescind the three loan transactions and demanded return of all monies paid by Plaintiff to Defendants, together with interest at the rate of 7% from the date of each payment, and further demanded that Defendants reconvey all right, title and interest claimed in Plaintiff's Nevada residence at 46 Country Club Lane, Las Vegas,

Nevada. Plaintiff has owned this residence since 1962.

This court granted Plaintiff a preliminary injunction, thus restraining the Defendants from selling, leasing, encumbering, releasing or otherwise affecting their interest in Plaintiff's residence. Defendants were further enjoined from failing to toll the running of Plaintiff's time for reinstatement or redemption under N.R.S. §107.080.

9. Regarding the business relationship between the Elerdings and IFC, the parties agree that Defendants the Elerdings paid loan proceeds due to IFC under the terms of the Promissory Note from IFC to the Elerdings in the following amounts and on the following dates by checks drawn payable to the order of Martin:

$12,120	check no. 4352	March 9, 1978
$21,000	check no. 4351	March 9, 1978

$17,250 check no. 4365 March 22, 1978

Additionally, Defendants the Elerdings paid IFC the sum of $46,280 by check no. 4353 dated March 9, 1978, payable to the order of IFC.

10. Regarding Plaintiff's state of residence, the parties have agreed that Plaintiff Smith has paid no state income taxes in California other than real property taxes on her California residences. Furthermore, Plaintiff has no California driver's license, but only one issued by the Department of Motor Vehicles, Las Vegas, Nevada. The parties agree that at no time did Defendants the Elerdings, see any of the loan documents executed by Plaintiff prior to the time escrow closed and the documents were recorded.

11. And finally, the parties have agreed that at all time relevant to this lawsuit, Plaintiff Keely Smith's occupation was as a professional singer and entertainer.

Keely Smith conducted and carried out her business as a professional singer and entertainer through the entity known as Keely Smith Enterprises, Inc., a corporation wholly owned by her and organized under and pursuant to the laws of the State of Nevada. Keely Smith Enterprises, Inc., maintained a bank account (No. 528-002191) at American City Bank in Beverly Hills, California. Keely Smith maintained personal bank accounts at City National Bank (No. 06-088226) in Los Angeles, and First National Bank (No. 819/392/2) in Las Vegas, Nevada.

12. On August 9, 1979, Defendants the Elerdings filed a Cross-Complaint for Indemnity against Max D. Martin, Marguerite Martin and IFC. During the trial, the court ordered that all evidence admitted in the main action also be admitted for the purposes of the Cross-Complaint for Indemnity. In

addition, during the trial of the case, the court granted a motion for involuntary dismissal, pursuant to Federal Rules of Civil Procedure 41(b) as to Defendants Marguerite Martin and T.D. Service Company. This same motion was denied as to Defendants Max Martin, IFC, Charles Elerdings and Janet Elerding.

13. The 1976 loan was negotiated, executed and performed in the State of California. The 1978 loan transaction was contracted for in the State of Nevada. The location of the subject matter collateral was in Nevada. The loan documents were executed in the State of Nevada. The Plaintiff (borrower) was then a resident of the State of Nevada. These factors, taken in aggregate, establish that Nevada has the most "significant relationship" to the 1978 transaction.

14. The Defendant Martin and IFC had only a brokers license which authorized

them to act as a broker in connection with loans made through those brokers listed with the Administrator of the Personal Property Brokers Laws of the State of California. Dr. Elerding was not on this list nor was he a licensed personal property broker.

15. The evidence demonstrates that the Plaintiff entered into the loan transactions in order to secure funds with which to put an act together and get back to work as an entertainer and so represented that purpose to defendant Martin at all times during the various discussions regarding the loans; that such purposes was business related and not for consumer purposes.

16. At no time during the subject transactions did Dr. Elerding enter into any contractual relationship with the Plaintiff. He only provided funds to Martin and IFC and in exchange therefore, he received an

assignment of the Smith Notes and Deeds of Trust. He had no personal contact with Smith during these transactions. He did not participate in any form of conspiracy, either for breach of an oral agreement to loan money or for conspiracy to defraud. The evidence fails to indicate that the Defendants ever conspired to do any wrongful acts against Plaintiff Smith regarding either the 1976 or 1978 loans.

Consequently Defendant Martin and IFC could not conspire between them to injure Plaintiff since they are one entity. Martin's activities in relation to the corporation's business are the acts of the corporation and while so acting, he could not conspire with the corporation of which he was a part.

Furthermore, I find that Plaintiff Smith was no defrauded by Elerding. He merely loaned money to Martin and IFC, which in turn was then loaned by Martin and IFC to Smith.

There is no evidence of any representations made by the Elerdings to Plaintiff Smith upon which she relied.

17. The rate on advances to member banks of the Federal Reserve Bank of San Francisco on or about January of 1976 and on or about November of 1976 was 5-1/2 percent. This figure, added to an additional 5 percent as allowed by the California Constitution allows a maximum non-usurious rate of 10-1/2 percent for which the parties could contract in writing as the rate of interest on the 1976 loans.

18. Exhibits 1 and 2, the Promissory Notes executed by Plaintiff, $160,000 and $60,000 respectively, carry an interest rate of 1-1/2 percent per month, or 18 percent per annum and therefore usurious to the extent of 7-1/2 percent per note.

19. That the lowest daily prime rate in Nevada in March 2, 1978, the date of the execution of the 1978 refinanced loan of $300,000, was 8 percent. The Nevada law provides that parties may agree to interest not exceeding 12%. Exhibit 10 shows that the note executed on March 2, 1978 bore an interest rate of 18 percent. I find that this note was usurious under Nevada Law (NRS 99.050(1)) to the extent that it exceeded the 12 percent per annum maximum non-usurious rate by 6 percent.

20. The evidence demonstrates that the Plaintiff at all times incident to the loans thought and expected all of the loans that she executed with IFC to bear a rate of 10 percent per annum, a rate of interest to which she was amenable; that Smith expected and was prepared to pay interest at 10%, which rate would have been non-usurious.

21. I find that the Plaintiff had fair use of the monies received from these loans and she should not reap a windfall of the 10 percent she expected to pay and which she claims was the bargained-for rate of interest on the loans.

22. I find that the Defendants Martin and IFC, as procurers of the loans for Plaintiff, were acting as Plaintiff's agent (testimony of Martin). These Defendants had a fiduciary duty to Plaintiff. These Defendants breached that duty. This resulted in the Plaintiff being charged numerous unwarranted fees and expenses as well as the additional increment of interest on the 1976 and 1978 loan transactions. Defendant Martin clearly violated his fiduciary duty to Plaintiff by simultaneously acting as a principal in these loan transactions and at the same time pretending to act solely as her agent.

23. That as a result of the wrongful acts of the Defendants Martin and IFC, through its agent Martin, said Defendants should be precluded from any right to compensation which they might otherwise have had as brokers of the loans to Plaintiff Smith and be required to disgorge to her all monies received from her, including all profits, commissions and expenses which they exacted incident to the 1976 and 1978 loan transactions.

For this reason, I specifically find that both the 1976 loan fee of $14,000 and the 1978 loan fee of $21,000 which Plaintiff was required to pay to Defendants IFC and Martin, were unwarranted and should be refunded to Plaintiff. And further, the incremental portion of interest above 10 percent on the 1976 loans and the 1978 loan should likewise be credited against what Plaintiff owes on the

outstanding $300,000 obligation created in 1978.

24. Defendants IFC and Martin charged Plaintiff Smith with a prepayment penalty of $11,520 on the 1976 loan of $160,000 when she renegotiated it in order to obtain the $300,000 loan in 1978. The purpose of a prepayment penalty is to protect the lender against a loss of projected interest in the event of prepayment of the debt. This court specifically finds that the prepayment penalty charged by Defendants IFC and Martin was not warranted in this case. The loan, as renegotiated in 1978, bore the same interest rate as the 1976 loan. The $300,000 loan renegotiation represented no threat of loss of anticipated interest to the lender, since the original loan was replaced with another obligation of an equal interest rate,

and this loan provided for the same penalty in the event of prepayment.

25. As shown by Exhibit 11.2, the Counterclaimants have executed an assignment of the Deed of Trust to Charles E. Elerding and Janet R. Elerding, thereby divesting themselves of any beneficial interest therein. Subsequently, to the said assignment the Elerdings started foreclosure proceedings against the secured property of plaintiff.

26. This court having found that the Plaintiff Smith has not prevailed on any theory or issue she has asserted against the Defendants Charles Elerding and Janet Elerding, then the Cross-claim for Indemnity against the Defendant's Max Martin and IFC do not lie.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the court concludes as a matter of law as follows:

1. That the loan transactions of 1976 are governed by California law since the place of negotiation, execution, contract and performance was in the State of California.

2. That the 1978 loan transactions are governed by Nevada law since the transactions were contracted for in the State of Nevada, the location of the subject matter collateral was located in the State of Nevada, the loan documents were executed in the State of Nevada and the Plaintiff (borrower) was then a resident of the State of Nevada. These factors taken in aggregate establish that Nevada has the most "significant relationship" to said transaction.

3. That the California Personal

Property Brokers Law (California Financial Code Section 22000-22653) which regulates the licensing of the business activities of personal property brokers does not apply to the 1976 loan transaction.

4. That the 1978 loan transaction of $300,000, involving no personal property whatsoever is governed and subject to Nevada law.

5. That the Federal Truth in Lending Act, 15 U.S.C. § 1601, is not applicable to either of the loan transactions involved in this case.

6. That the Plaintiffs Elerdings and Martin, on behalf of IFC, did not conspire or combine together to do wrongful acts against Plaintiff regarding either the 1976 loan transaction as construed under California law nor the 1978 loan transaction as construed under Nevada law. (Orloff v. Metropolitan

Trust Co., 110 P.2d 396 (Cal. 1941); William Inglis & Sons v. ITT Baking Co., 668 F.2d 1014—(1981); and Webb v. Culberson, 357 F.Supp. 923 (1973)).

7. That the 1976 loan is usurious and must be determined according to the limitations set forth in Article 15, Section 1 of the California Constitution.

8. That the 1978 loan must be interpreted under Nevada usury laws and is usurious by 6 percent (NRS 99.050(3)).

9. That the Defendants Martin and IFC breached their fiduciary duty to Plaintiff which resulted in her being fraudulently charged unwarranted fees, expenses and commissions.

10. That disgorgement of monies or property fraud obtained by an agent from the principal is the proper remedy for breach of the fiduciary relationship. McDonald v.

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O'Meara, 473 F.2d 799, 93 S.CT. 2293, 412 U.S. 906 (1973).

11. The purpose of a prepayment penalty is to insure that the lender is indemnified in the event that projected interest due is lost because of prepayment on the debt. A lender is not entitled to a prepayment penalty when the loan is renegotiated and the renegotiated loan represented no threat of loss of anticipated interest to the lender.

12. The Counterclaim should be dismissed. The Counterclaimants had no beneficial interest in the Promissory Note and the Deed of Trust.

The Elerdings, by instituting foreclosure proceedings, precluded Counterclaimants from seeking the relief sought by the Counterclaim. (NRS 40.430(1)); Keever v. Nicholas Beer Co., 96 Nev. 509, 611 P.2d 1079 (1980)

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Nevada Wholesale Lumber Co. v. Myers Realty, 92 Nev. 24, 544 P.2d 1204 (1976).

13. The Cross-claim of Elerdings against IFC and Martin should be dismissed.

DATED: This 6th day of October, 1983.

/s/ HARRY CLAIBORNE
CHIEF JUDGE, U.S. DISTRICT COURT

LAW OFFICES OF JOHN &
ELIZABETH FOLEY
601 S. Rancho, Suite A1
Las Vegas, Nevada 89106

Attorney for Plaintiff
702-386-5900

(Received and Filed October 20, 1983 by Carol C. Fitzgerald, Clerk)

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * * * *

KEELY SMITH, Plaintiff, v. INTERNATIONAL FUNDING CORPORATION, a California corporation; MAX D. MARTIN, an individual; MARGUERITE L. MARTIN, an individual; CHARLES E. ELERDING, JR., an individual; JANET R. ELERDING an individual; T.D. SERVICE COMPANY, a California corporation, Defendants.	CV-LV-79-111,HEC

MOTION UNDER F.R.C.P. RULE 59 TO ALTER OR AMEND JUDGMENT.

COMES NOW the Plaintiff and moves this Court pursuant to Rule 59 (e) of the Federal Rules of Civil Procedure, to alter or amend the judgment entered herein on October 7th, 1983 in the following particulars, and on the following grounds:

1. That paragraph 4 of said Judgment be amended to provide that Plaintiff be relieved of any obligation to pay any sum of interest whatsoever.

2. That the Preliminary Injunction heretofore issued be not dissolved until the Judgment entered herein becomes final.

LAW OFFICES OF JOHN P. FOLEY

BY: _____

JOHN P. FOLEY, ESQ.
601 S. Rancho, Al
Las Vegas, Nevada 89106

POINTS AND AUTHORITIES

At page 36, 37, 38 and 39, the Court discussed the Nevada cases of Pease v. Taylor, 88 Nev. 287, 496 P.2d 757; Kline v. Robinson, 83 Nev. 244, 428 P.2d 190; and the California case of Stock v. Meek, 35 Cal.2d 809, 221 P.2d 15, Stephans v. Herman, 225 Cal.App. 2d 671, 37 Cal. Rptr. 746; E. Glushon, The California Usury Law, 43 Cal. St. B.J. 56, (1968).

Plaintiff respectfully urges that if the note had been executed at 10%, Plaintiff would not have found herself in the problem she did, and would not have been required to institute this action. Plaintiff feels that she is entitled to the benefit of the law that relieves her of the obligation to pay any interest on a usurious loan.

Plaintiff respectfully requests that the Preliminary Injunction remain in effect until the Decision is final in this case, so that all parties will know the amount of money involved in any foreclosure.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF JOHN P. FOLEY

BY: _____

JOHN P. FOLEY, ESQ.
601 S. Rancho, A1
Las Vegas, Nevada 89106
Attorney for Plaintiff

RECEIPT OF A COPY of the foregoing Motion is hereby acknowledged this 20th day of October, 1983.

LIONEL, SAWYER & COLLINS

BY: /s/ D.K./ST G

DENNIS KENNEDY ESQ.
1700 Valley Bank Plaza
300 So. Fourth Street
Las Vegas, Nevada 89101

WILLIAM L. McGIMSEY, ESQ.

BY: /s/WILLIAM McGIMSEY/et
WILLIAM L. McGIMSEY, ESQ
300 So. Fourth, # 600
Las Vegas, Nevada 89101

CERTIFICATE OF MAILING

The undersigned certifies that she served a copy of the foregoing Motion on the Defendants Elerding, by placing a copy thereof in the United States Mail, postage prepaid, addressed to the Defendants' attorney, as follows:

ALVARADO, RUS & McCLELLAN
A Professional corporation
Bank of America Tower, Suite 308
One City Boulevard, West
Orange, California 92668

DATED this 20 day of October, 1983.

/s/ MARLYS OSBURN
Marlys Osburn